Supreme Court, U.S.
FILED

931747 MAY - 4 1994

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No. _____

IN THE

Supreme Court of the United States

October Term, 1993

EIGHT UNKNOWN OFFICERS,
Petitioners,

vs.

MARILYN CENTANNI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

55 pp

QUESTIONS PRESENTED

I. DOES *DUNAWAY v. NEW YORK*, 442 U.S. 200, 60 L. ED. 2D 824, 99 S. CT. 2248 (1979), COMPEL THE CONCLUSION, REACHED BY THE SIXTH CIRCUIT COURT OF APPEALS, THAT THE CLEARLY ESTABLISHED STANDARD FOR DETERMINING WHETHER A SEIZURE-DETENTION IS CONSTITUTIONALLY PERMISSIBLE IS NOT WHETHER THE POLICE OFFICERS' ACTIONS WERE REASONABLE UNDER THE CIRCUMSTANCES BUT RATHER WHETHER THE OFFICERS, REGARDLESS OF THE CIRCUMSTANCES, HAD PROBABLE CAUSE TO ARREST?

II. MAY POLICE OFFICERS CONDUCTING SURVEILLANCE ON THE HOME OF A SUSPECT IN AN ATTEMPTED AGGRAVATED MURDER, WHILE AWAITING THE ARRIVAL OF THE ARREST WARRANT, SEIZE A LATE NIGHT DEPARTEE FROM THE HOME TO MAKE SURE THE SUSPECT AND/OR EVIDENCE IS NOT BEING REMOVED AND TEMPORARILY DETAIN THE DEPARTEE TO PREVENT THE SUSPECT FROM BEING FOREWARNED OF HIS IMMINENT ARREST AND LESSEN THE LIKELIHOOD OF ARMED RESISTANCE, A HOSTAGE SITUATION OR FRANTIC EFFORTS TO FLEE OR CONCEAL EVIDENCE?

III. IS IT A VIOLATION OF CLEARLY ESTABLISHED LAW FOR POLICE SURVEYING THE HOME OF A SUSPECT IN AN ATTEMPTED AGGRAVATED MURDER WHILE AWAITING THE

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is attached as Appendix A, pp. A1-A10. The Opinion of the Honorable Paul Matia of the United States District Court for the Northern District of Ohio, Eastern Division, is attached as Appendix B, pp. A11-A21.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 3, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES INVOLVED

Title 42, U.S.C. §1983 states:

> **§1983. Civil action for deprivation of rights**
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is an action for damages brought under Title 42, U.S.C. §1983 for an alleged violation of the Fourth and Fourteenth Amendments. As noted by the district court, the facts are not in dispute. Appendix, page A11.

Shortly before midnight on February 19, 1991, Mr. Joseph DiBlasi entered the Walton Hills Police Department with gunshot wounds. He claimed that shots were fired at him from a blue van while he was stopped at a red light in Walton Hills and identified the assailant as Mr. Nicholas Lombardo. It was later learned that Mr. Lombardo resided at 1210 Genesee in Mayfield Heights, Ohio, and that he owned a blue van matching the description given by Mr. DiBlasi.

A teletype was issued by the Walton Hills Police Department to all Northeast Ohio police departments that a shooting had taken place and giving a description of the Lombardo vehicle and its direction of travel. A call was also made to the Mayfield Heights Police Department requesting confirmation of the existence of the Lombardo address and learning that a blue van was parked in the driveway. The Mayfield Heights Police were asked to watch the Lombardo residence until an arrest warrant could be procured, and then to make the arrest. Walton Hills authorities then secured a warrant for the arrest of Nicholas Lombardo. Chief Joseph Barr and Sergeant Kenn Thellman of the Walton Hills Police Department drove to Mayfield Heights, arriving at 2:35 a.m.

Meanwhile, the respondent, Marilyn Centanni, had arrived at the Lombardo residence at approximately 9:05 p.m. on February 19, 1991, to visit the son of Nicholas Lombardo. At approximately 11:15 p.m., she heard

Nicholas Lombardo arrive home and begin to argue with his wife, to pace, and to make a lot of noise. She left the Lombardo residence at about 12:25 a.m.

Lieutenant Van Barto was in charge of the Mayfield Heights Police Department from midnight to 8:00 a.m. on February 20, 1991. He received the request for assistance from Walton Hills and assigned Officers William Lawson and Robert Cunningham to watch the Lombardo residence. Officer Lawson took a position near the house at about 12:20 a.m. At about 12:30 a.m., he observed a vehicle backing out of the driveway at 1210 Genesee and proceed north toward Ridgebury Boulevard. Officer Lawson did not see anyone enter the automobile and informed the Mayfield Heights Police Dispatcher only that an auto had left the residence.

Officer Robert Cunningham had taken a location nearby where he could see the rear of the Lombardo residence. Lieutenant Barto ordered Officer Cunningham to leave this position and stop the vehicle. Officer Cunningham did so using overhead lights on Ridgebury Boulevard, less than one mile from the Lombardo home. He obtained the driver's license and the keys to the vehicle. He returned to the police cruiser to check reports on the driver who was identified as the respondent, Marilyn Centanni.

At or about this time, Sergeant Alvin Schmitt and Lieutenant Barto arrived, each driving a police car. The respondent's car, purse, and book bag were searched for the weapon per her consent. She was also patted down admitting that nothing about the patdown was improper.

According to Lieutenant Barto, the respondent was stopped because she had just left the residence of a person suspected of committing attempted murder and

the suspect and/or evidence may have been in the car. The search of her person, purse, and automobile was confined to a search for a handgun.

After the limited search was complete, Ms. Centanni was told, while still on Ridgebury, that there had been a shooting and that Nick Lombardo was a suspect, and they did not want her making any phone calls which would inform Nick Lombardo of the impending arrest. The police were concerned that a shootout or hostage situation could arise if Mr. Lombardo was tipped off. She was required to go to the station and was permitted to drive her own car with police escort.

At the station, respondent read and waived her Miranda rights. She was then questioned by Officer David Anderson about her knowledge of the whereabouts of Nick Lombardo and whether she knew of any firearms in the Lombardo house. She was also asked for a description of the inside of the Lombardo residence. She informed the police that Nick Lombardo was at his home and that she knew that he kept guns in the house. She also told the police that two other people, his son and wife, were in the house with Nick Lombardo. A written statement was prepared. There is no indication that any of the questions were accusatory or adversarial. The respondent estimates that she spoke to the Mayfield Heights Police for about thirty minutes and to the Walton Hills Police for about five minutes.

After making a statement, Ms. Centanni was offered a choice of locations to await the arrest, eventually choosing the visitor's waiting room at the police station. While she waited she was asked if she needed anything and was brought coffee and her school books to study.

Lieutenant Barto determined that the Mayfield Heights SWAT team should be deployed to make the arrest. The appropriate personnel were called and took

up locations around the Lombardo household. Shortly after 4:00 a.m., when all personnel were in place, Lieutenant Barto telephoned Mr. Lombardo and explained to him that his house was surrounded and that a warrant was issued for his arrest. Mr. Lombardo was asked to walk out the front door and voluntarily submit to arrest, which he did.

As soon as Mr. Lombardo was arrested on the charge of attempted aggravated murder, the respondent was allowed to leave. Police records indicate that she left the station at about 4:20 a.m. She has acknowledged that the entire time she was with the Mayfield Heights Police, she was treated courteously.

Respondent filed her lawsuit through Title 42 U.S.C. §1983, alleging violations of the Fourth and Fourteenth Amendments. The jurisdiction of the District Court was invoked under Title 28 U.S.C. §1391(b).[1] On November 6, 1992, the trial court denied the motion for summary judgment brought by defendants, police officers, on their claim of qualified good faith immunity. At the same time, the district court granted respondent's motion for summary judgment finding that her detention violated clearly established law because it lacked probable cause. An appeal was taken to the United States Court of Appeals for the Sixth Circuit which had interlocutory jurisdiction under Title 28 U.S.C. §§41 and 1291 as interpreted in *Mitchell v. Forsyth*, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). The Sixth Circuit affirmed the denial of qualified immunity for petitioners on February 3, 1994, and appeal was taken to this Court.

[1] The plaintiff subsequently amended her complaint naming the defendants as Chief Dominic Caprara, Lieutenant Van Barto, Sergeant Alvin Schmitt, and Officers David Anderson and Robert Cunningham, all of the Mayfield Heights Police Department, as well as the City of Mayfield Heights.

REASONS FOR GRANTING THE WRIT

I. Does *Dunaway v. New York*, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979), Compel The Conclusion, Reached By The Sixth Circuit Court Of Appeals, That The Clearly Established Standard For Determining Whether A Seizure-Detention Is Constitutionally Permissible Is Not Whether The Police Officers' Actions Were Reasonable Under The Circumstances But Rather Whether The Officers, Regardless Of The Circumstances, Had Probable Cause To Arrest?

The United States Court of Appeals for the Sixth Circuit relied almost exclusively on this Court's decision in *Dunaway v. New York*, 442 U.S. 200 (1979), in holding that the detention in this case was unconstitutional because it was not supported by probable cause to arrest. The court refused to apply a test of reasonableness under the circumstances as clearly established law and ultimately denied qualified immunity. At page 7 of its opinion, the circuit court noted:

> Centanni's detention more closely resembles the facts of *Dunaway v. New York*, 442 U.S. 200 (1979), where the police—without probable cause—took Dunaway to the station for questioning and, after obtaining incriminating statements, placed him under arrest. According to the police, the initial seizure and subsequent detention did not amount to an arrest because they had a "reasonable suspicion" that Dunaway possessed "intimate knowledge about a serious and unsolved crime." *Id.* at 207. The *Dunaway* Court, however, refused to adopt a multifactor balancing test of "reasonable police conduct under the circumstances." *Id.* at 213.

> Instead, the Court made it clear that such a test is limited to the "narrowly defined intrusions involved in *Terry* and its progeny."[1]

Appendix, page A7.

In a qualified immunity analysis, the court's initial duty is to identify the clearly established law to be applied. The petitioner herein argues that the reasonableness balancing test should have been applied rather than a hard and fast rule of probable cause.

A review of the facts of this case demonstrate that the respondent's detention was unlike *Dunaway* because it occurred during a swiftly developing situation and was necessitated by the on-the-spot observations of the officers. The Sixth Circuit's holding is at odds with numerous decisions of this Court reviewing the impromptu spontaneous decisions of our police officers. The seizure of Dunaway was solely for the purpose of gathering information and was not necessitated by concerns of flight, destruction of evidence, the taking of hostages, the safety of officers or others, or any other exigency. It was planned to provide the police an opportunity to interrogate Dunaway and secure a confession. In the instant case, the motivation behind the detention was not the desire to further an investigation but rather the orderly and safe execution of an arrest warrant.

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[1] The Sixth Circuit, in reciting what it found to be clearly established law stated, "it has been clearly established that—regardless of any exigent circumstances—the seizure and removal to the station house of an individual who is not suspected of any criminal activity constitutes a de facto arrest requiring probable cause." Appendix, page A9. Petitioners are unable to uncover any case that disregards exigent circumstances.

The Fourth Amendment forbids unreasonable searches and seizures. The benchmark of reasonableness under the Fourth Amendment is probable cause, and its existence establishes reasonableness as a general rule. However, the reasonableness of police conduct does not turn solely on probable cause. Reasonableness is also determined by the balancing of competing interests, weighing the nature of the intrusion against the legitimate police objectives justifying the intrusion. This Court applies the reasonableness balancing test when special law enforcement interests demand greater flexibility. This is especially true in swiftly evolving situations confronted by the officer on the beat requiring immediate action. Consequently, contrary to the holding of the Sixth Circuit, the application of the reasonableness test is not limited exclusively to brief encounters such as in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, 44 Ohio Op. 2d 383 (1968). Such interpretation is exactly that which Justice White cautioned against in his concurring opinion in *Dunaway*:

> The opinion of the Court might be read to indicate that *Terry v. Ohio* . . . is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases hold, however, *the key principal of the Fourth Amendment is reasonableness—the balancing of competing interests* (citations omitted). 60 L. Ed. 2d at 840.

Later, in *New Jersey v. TLO*, 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985), Justice White, expressing a majority viewpoint, reaffirmed his support for the reasonableness balancing test stating:

> Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

In fact, the concept of reasonableness as the "key principle of the Fourth Amendment" became so entrenched by 1985 that Justice White in *Tennessee v. Garner*, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985), was able to cite numerous cases to support the proposition that:

> [T]o determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983); see *Delaware v. Prouse*, 440 U.S. 648, 654, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976). We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." *Michigan v. Summers*, 452 U.S. 692, 700 n. 12, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981). See also *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967). Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. *United States v. Ortiz*, 422 U.S. 891, 895, 45 L. Ed. 2d 623, 95 S. Ct. 2585 (1975); *Terry v. Ohio*, 392 U.S. 1, 28-29, 20 L. Ed. 2d 889, 88 S. Ct. 1868, 44 Ohio Op. 2d 383 (1968).

Id., 471 U.S., at 8, 85 L. Ed. 2d, at 7-8. *See also, e.g., Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978); *Skinner v. Railway Labor Executive's Assn.*, 489 U.S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1902 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987); *New York v. Burger*, 482 U.S. 691, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987); *O'Connor v. Ortega*, 480 U.S., at 721-

725, 94 L. Ed. 2d 714, at 724, 107 S. Ct. 1492 (1987); *Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979); *United States v. Montoya De Hernandez*, 473 U.S. 531, 87 L. Ed. 2d 381, 105 S. Ct. 3304 (1985); and other cases cited herein.

This Court has also used the reasonableness balancing test to find searches and seizures to be unreasonable, due to the severity of the intrusion, even when probable cause exists, *Tennessee v. Garner, supra*, and when there has been prior judicial approval. *Winston v. Lee*, 470 U.S. 753, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985).

The facts of the present case are appropriate for "generic recognition" of an important exception to the rule of probable cause as the circumstances clearly dictate the need for more flexibility. This Court should recognize that the temporary detention of a person, whose seizure was valid at its inception, to prevent that person from warning a known violent felon of his imminent arrest is reasonable and therefore constitutional. Forewarning the suspect would have enhanced the possibility of an armed encounter, a hostage situation, or efforts to flee and conceal evidence.

Such a rule would not be inconsistent with *Dunaway*, where the police seized Dunaway only for investigative purposes and could not articulate any other legitimate police objective served by the seizure and detention. *Dunaway* is simply one of a number of cases disapproving of seizures amounting to technical arrests without probable cause when done only for investigatory purposes. *Davis v. Mississippi*, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969); *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 985 S. Ct. 2254 (1975); *Hayes v.*

Florida, 470 U.S. 811, 84 L. Ed. 2d 705, 105 S. Ct. 1643 (1985). These cases retain their vitality in those circumstances as an identifiable category of cases disapproving of seizures without probable cause solely for the purpose of gathering facts. Further, the fear expressed in *Davis, supra*, that "investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention," *id.*, at 726, would not be implicated in this rare instance of a substantially less severe intrusion and stronger governmental interests. In such a situation, *Dunaway* does not control.

Petitioner urges that plenary review be granted to correct the erroneous construction given the Fourth Amendment by Sixth Circuit Court of Appeals in finding that this Court made it clear in *Dunaway, supra*, that the reasonableness test is "limited to the narrowly defined intrusions involved in *Terry* and its progeny." Appendix, page A7.

II. May Police Officers Conducting Surveillance On The Home of A Suspect In An Attempted Aggravated Murder, While Awaiting The Arrival Of The Arrest Warrant, Seize A Late Night Departee From The Home To Make Sure The Suspect And/Or Evidence Is Not Being Removed And Temporarily Detain The Departee To Prevent The Suspect From Being Forewarned Of His Imminent Arrest And Lessen The Likelihood Of Armed Resistance, A Hostage Situation Or Frantic Efforts To Flee Or Conceal Evidence?

Both the court of first instance and the Sixth Circuit Court of Appeals refused to apply the multi-factor balancing test of "reasonable police conduct under the circumstances" to the instant case. See, Appendix A, at pages A7-A8; Appendix, at page A19. The circuit court found that such a test is limited to the narrowly defined intrusions involved in *Terry v. Ohio, supra.* Appendix, page A7.

Petitioner submits that if the reasonableness balancing test, as applied by this Court in *Michigan v. Summers,* 452 U.S. 692, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981), were applied in the instant matter the respondent's detention would be deemed reasonable, *Summers* was cited by the petitioners not because of factual similarity, but rather to express the manner in which this Court balanced the nature of the intrusion against the legitimate police objectives justifying the intrusion. Most notably, Justice Stevens, writing in *Summers,* cited a list of cases in which the reasonableness test was applied and stated that:

> . . . they demonstrate that the exception for limited intrusions justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams v. Williams,* 407 U.S. 143, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972).

Summers, 452 U.S. at 700, 69 L. Ed. 2d at 348.

In *Summers, supra*, this Court held that in assessing the justification of a detention, both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. The Court found that the *Summers* intrusion was justified by four legitimate law enforcement interests:

> 1. To prevent flight in the event that incriminating evidence is found.
>
> 2. Of possibly greater importance is minimizing the risk of harm to the officers;
>
> 3. To prevent sudden violence or frantic efforts to conceal or destroy evidence; and
>
> 4. To facilitate the orderly completion of the search.

Id., 452 U.S., at 702, 69 L. Ed. 2d, at 349.

Both the Sixth Circuit and the district court refused to apply the reasonableness test as used in *Summers* on the basis of factual discrepancies. The appellate court stated:

> However, as the district court determined, the Officers' reliance on *Summers* is severely misplaced. The district court distinguished *Summers* on three grounds: 1) the detention in that case was incident to a proper search warrant; 2) Summers was an "occupant" of the premises named in the search warrant; and 3) Summers' detention was brief, limited only to the time necessary to search the premises. Significantly, the detention in *Summers* was confined to the suspect's home. The Court implicitly recognized as much when it noted that such a seizure involves "neither the inconvenience nor the indignity associated with a compelled visit to the police station." Appendix, page A7.

The appropriate inquiry should have focused not on the facts of *Summers* but rather on how this Court balanced legitimate police interests against the nature of the intrusion. The facts upon which the lower courts relied to distinguish *Summers* are, according to this Court, factors which should be considered when doing the requisite balancing, but are not determinative. While the petitioners did not have a warrant in hand for the arrest of Mr. Lombardo when the respondent was detained, and the police in *Summers* did, this Court noted in *Summers* that the warrant's existence "does not, of course, preclude the possibility that *comparable police conduct may be justified by exigent circumstances in the absence of a warrant.*" *Id.*, footnote 17, 452 U.S. at 702, 69 L. Ed. 2d at 350.[3] If permitted, the petitioners will establish that the circumstances of this case easily justify the conduct of the police.

Also, refusing to apply the reasonableness test because *Summers* was an "occupant" and Centanni only a visitor defies the purpose of the reasonableness test. The concern is not the physical connection between the detainee and the premises, but rather whether the detainee imperils the police operation or other law enforcement interests. Surely, this Court did not intend to prohibit reasonable detentions of non-occupants who could imperil the safety of warranted police action. In approving the initial stop of respondent, the district court noted the formidable link between petitioner and the suspect's residence stating, "this is not a case where

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[3] Awaiting the arrival of the warrant before arresting Lombardo in his home was constitutionally prudent. *Payton v. New York*, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980); *Elder v. Holloway*, 127 L. Ed. 2d 344 (1994). Notably, in *Elder v. Holloway*, Justice Ginsberg noted that access to guns might support an exigent circumstances plea. *Id.* at 349, footnote 1.

reasonable suspicion was based on association or proximity to persons suspected of criminal activity . . . *Centanni was leaving the home of a murder suspect identified by the victim.*" Appendix, page A16 (emphasis added). She departed at 12:30 a.m. and, as the police learned, was a regular guest in the suspect's home. She also informed the petitioners that Lombardo kept several guns in his home. Their concern that if she was permitted to leave she could forewarn the suspect of his impending arrest was objectively reasonable. Certainly, it would imperil the safety of the arrest operation that was underway. This Court has never required the police to choose between placing themselves or others in greater danger and personal liability. Reasonableness is all that is required.

This Court has also made it abundantly clear that while the duration of the detention is an important factor in the balancing of interests, it is likewise not the determinative issue. In *United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 615, 105 S. Ct. 1568 (1985), this Court discussed the duration of a detention and noted:

> But our cases impose no rigid time limitations on Terry stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," *United States v. Place*, 462 U.S. at 709, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. (Citations omitted).

Sharpe, 470 U.S. at 685, 84 L. Ed. 2d 615, 105 S. Ct. 1568 (1985); *Michigan v. Summers*, 452 U.S. at 705, fn.21.

Thus, the duration of the detention did not demand probable cause but was also subject to application of the reasonableness test. The courts should have inquired into whether the detention was prolonged or tailored to accomplish the police objectives. In *Summers, supra*, this Court permitted a detention, "while a proper search is conducted." 452 U.S., at 705. At that point, the legitimate police objectives were served. In the instant case, the police appropriately ended the respondent's detention when the suspect was safely arrested.

Applying the reasonableness test, this Court has approved detentions of a few minutes, *Terry, supra;* twenty minutes, *Sharpe, supra;* 16 hours, *United States v. Montoya De Hernandez,* 473 U.S. 531, 87 L. Ed. 2d 381, 105 S. Ct. 3304 (1985); and as long as it takes to complete a search, *Michigan v. Summers, supra. Also see Daniel v. Taylor,* 802 F.2d 1398 (1986); *United States v. Rowe,* 694 F. Supp. 1420 (N.D. Cal. 1988).

The Circuit Court also erred in not examining the nature of the intrusion on Centanni's rights. Rather, the court categorically found the detention impermissible because:

> [N]either *Terry* nor its progeny—including *Summers*—addressed a situation where the police seized an individual whom they did not even suspect of any crime and transported her to the station, questioned her extensively in the middle of the night, and then kept her under surveillance in a prisoners visiting room.

Appendix, page A8.

Missing from this scenario are the legitimate police objectives served by the detention and the reasonable fears of those officers who were then dressing in bulletproof vests to arrest a known violent felon.

Further, the above scenario provided by the circuit court ignores the nature of the intrusion on Centanni's rights. Consider that she knew the nature and reason for her detention at the outset. She was aware that she had no reason to fear prosecution and was never left in suspense. The detention in *Dunaway*, on the other hand, was not only custodial, but also accusatory and confrontational. His Fourth Amendment rights were violated solely for the purpose of gathering facts to establish probable cause. Centanni was never the focus of the investigation and her privacy interests were not infringed. She was questioned regarding Lombardo's state of mind, access to weapons, ingress and egress to the house, as well as other occupants. She was kept as comfortable as possible and admitted in discovery that she received courteous treatment at all times.

Along with mischaracterizing the nature of the intrusion, the Sixth Circuit also misread this Court's opinion in *United States v. Sharpe*, 470 U.S. 675 (1985) and *Florida v. Royer*, 460 U.S. 491 (1983), erroneously declaring that these cases forbid the movement of a detainee without probable cause. Appendix, page A8. The circuit court quoted Justice Marshall, concurring in *Sharpe*, for the proposition that "a stop can also be unduly intrusive if the individual is moved or asked to move more than a short distance . . ." Appendix, page A8. However, the complete sentence of Justice Marshall's footnote reads:

> A stop can also be unduly intrusive if the individual is moved or asked to move more than a short distance, if a search is more extensive than necessary to protect the police from an objective fear of danger, or if tactics amounting to custodial interrogation are used. *See Dunaway v. New York*, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248

> (1979); *Kolender v. Lawson,* 461 U.S. 352, 365, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983) (Brennan, Jr., concurring).

United States v. Sharpe, 470 U.S.at 692, footnote 2.

Clearly, Justice Marshall, a proponent of the application of the rule of probable cause, also notes an exception when "... necessary to protect the police from an objective fear of danger."

The circuit court also characterizes *Florida v. Royer, supra,* as a case in which "a stop was converted to an arrest when officers moved detainee from the airport concourse to a small room during an airport stop." Appendix, page A8. A reading of *Royer* establishes that the plurality opinion did not establish such a categorical rule. Instead, the move to the interrogation room was questioned because the officer's primary interest was not extended conversations with Royer, but the contents of his luggage. *Id.*, 460 U.S. at 505. In fact, the *Royer* plurality found that:

> ... there are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area. *Cf. Pennsylvania v. Mimms,* 434 U.S. 106, 109-111, 54 L. Ed. 2d 331, 98 S. Ct. 330 (1977) (*per curiam*).

Id., 460 U.S. at 504-505; *See, also,* dissent by Justice Rehnquist, joined by Chief Justice Burger and Justice O'Conner, 460 U.S. at 528.

Clearly, it was not moving Royer that dictated the unconstitutionality of the police action. Rather, it was what the plurality found to be the availability of less intrusive alternatives, an analysis later found in *Sharpe* to be improper. *Sharpe*, 470 U.S. at 686-687. The question is not the availability of an alternative, but whether police *acted unreasonably* in failing to recognize and pursue it. *Id.*, 470 U.S. at 687 (emphasis added).

The question which the lower courts should have addressed was what, if anything, was unreasonable about the steps which these officers took with respect to this plaintiff on this date, under these circumstances, and whether the intrusion was justified by legitimate police objectives.

This case offers the Court an opportunity to clearly establish, in a categorical fashion, the proposition that the Fourth Amendment prohibits only unreasonable searches and seizures. In instances requiring prompt police action, with reasonable safety concerns, the probable cause standard must yield to the reasonable balancing test, which is the clearly established law.

III. Is It A Violation Of Clearly Established Law For Police Surveying The Home Of A Suspect In An Attempted Aggravated Murder While Awaiting The Arrival Of An Arrest Warrant To Seize A Late Night Departee To Assure That The Suspect And/Or Evidence Is Not Being Removed, And To Temporarily Detain That Person Until The Arrest Is Made To Prevent The Suspect From Being Warned Of His Imminent Arrest And To Lessen The Likelihood Of An Armed Encounter, A Hostage Situation, Or Frantic Efforts To Flee Or Conceal Evidence?

The lower court's refusal to examine the facts of this case through application of the reasonableness balancing test had a direct impact on the qualified immunity decision.

This Court has firmly established that the doctrine of qualified immunity as applied to damage actions, under provisions such as 42 U.S.C. Section 1983, charging public officials with violations of federal rights—shields such officials from such damage actions unless the officials' conduct was unreasonable in light of clearly established law of which a reasonable person would have known. *See, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, at 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); *Anderson v. Creighton,* 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). Most recently, in *Elder v. Holloway,* 127 L. Ed. 2d 344 (1994), this Court reiterated that:

> The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald, supra,* at 806.

Elder v. Holloway, supra, at 350.

In order to become a clearly established right the contours must be sufficiently clear in a particularized sense so that a reasonable official will understand that

what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. at 640. This requirement accommodates the public policy that police officers should be free to discharge their duties without fear of personal monetary liability or harassing litigation. *Id.*, at 638. *Also see Forrester v. White*, 484 U.S. 219 (1988). The "clearly established" standard protects the officer on the street who is required to react to unique and difficult situations and also permits vindication for those whose rights have been violated by the officer who is plainly incompetent or knowingly violates the law. *Id.*, at 638; *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). The circuit court, in its opinion, citing *Anderson v. Creighton*, noted that the phrasing of the issue must be sufficiently particularized so as not to render the defense meaningless by converting it "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Appendix, page A9. The court then phrased the clearly established law it applied as follows:

> In light of the decisions discussed above, we conclude that it has been clearly established that—regardless of any exigent circumstances—the seizure and removal to the station house of an individual who is not suspected of any criminal activity constitutes a de facto arrest requiring probable cause.

Appendix, page A9.

The phrasing of this statement of "clearly established law" is not sufficiently particularized when it begins by disregarding the exigent circumstances. There is no case which does so. The clearly established law created by this panel of the circuit court is a product of its own legal philosophy and not a rational analysis of prior case law. This is wholly unfair to the petitioners who should be able to rely on the teachings of this Court

and its use of reasonableness in Fourth Amendment cases. Petitioner suggests that the clearly established law which should have been applied to this Fourth Amendment seizure was the test of reasonableness under the circumstances which considers the exigencies. The cases cited by the Sixth Circuit, *Dunaway v. New York, supra, Beck v. Ohio,* 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964) and *Florida v. Royer, supra,* in support of its decision all deal with detentions solely for investigatory purposes. None involve substantial police interests such as safety of the officers and others, and none involve the necessity of immediate police action.

Petitioners will demonstrate that the facts of this case establish that their conduct was neither incompetent nor a violation of a clearly established right. The facts present the typical scenario for which the qualified immunity doctrine exists. There is no insolent use of authority, overzealousness, overhanded police conduct or willful violation of clearly established law. Rather, the petitioners' conduct was a reasoned response to the situation they encountered.[4] Their concerns for the safety of themselves, others, and the respondent were legitimate in view of the fact that if the suspect was forewarned the entire operation would be jeopardized. The intrusion on the respondent's Fourth Amendment rights, although clearly implicated, was minimal and tailored to the accomplishment of legitimate objectives.

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[4] It must always be remembered that the petitioners were about to arrest a man who had only a couple hours earlier shot another human being several times. Their concern that he would shoot at them or take family members or respondent hostage, had she returned, was realistic. *See, Llaguno v. Mingey,* 763 F.2d 1560, at 1567 (1985).

Given the avalanche of case law already cited in support of application of the reasonableness balancing test and the clear factual distinctions between *Dunaway* and other cases involving investigatory detentions, it is clear that the circuit court applied incorrect "clearly established" law.

This seizure was not a fact-gathering detention. It was a response to exigent circumstances which occurred after probable cause was ascertained and which required immediate police action for the safe execution of a warrant. To resolve this issue, this Court needs to examine cases involving the reasonableness of detentions occurring while police are taking or preparing to act on a warrant. The case of *Michigan v. Summers, supra*, while not fully factually analogous, provides an appropriate point of departure to resolve the issue. Each case involves a police confrontation with an individual while in the process of taking action pursuant to probable cause. Each case involved the detention of a person intimately associated with the object of the warrant even though the warrant or probable cause was not directed at that person. Each detention was supported by articulable law enforcement interests. In *Summers*, the reasonableness balancing test was applied to find the detentions patently reasonable. That is what should have happened here, but at the very least these officers are entitled to qualified immunity because there is no case under which a detention under similar facts was found illegal. In fact, it is reasonable to believe that such detentions are sanctioned by *Summers, supra*.

The Constitution does not require the police to face increased danger when a reasonable intrusion on a person's rights will lessen the danger. As was stated by the *Summers* court:

> The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation. *Cf.* 2 WF. La Fave, *Search and Seizure*, §4.9 pp. 150-151 (1978).

Summers, at 702, 703.

This case offers the Court the opportunity to distinguish two categories of Fourth Amendment activities and set forth the clearly established law to be applied in a qualified immunity analysis. In cases of seizures amounting to technical arrests, solely for investigatory purposes, probable cause is required. In cases involving instantaneous police action, taken in swiftly developing situations, implicating legitimate law enforcement interests, the reasonableness balancing test must be applied to determine constitutionality. It is requested that plenary review be granted to correct the erroneous decision of the Sixth Circuit and apply the reasonableness balancing test to this most appropriate situation.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, plenary review should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed February 3, 1994)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0033P (6th Cir.)
File Name: 94A0033P.06

No. 92-4331

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARILYN CENTANNI,
Plaintiff-Appellee,

v.

EIGHT UNKNOWN OFFICERS,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Before: MARTIN and JONES, Circuit Judges; and DEMASCIO, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judge. Defendants-Appellants Eight Unknown Officers ("the Officers") appeal the district court's denial of their motion for summary

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*The Honorable Robert E. DeMascio, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

judgment on their claim of qualified immunity from Plaintiff-Appellee Marilyn Centanni's section 1983 lawsuit alleging that they violated her Fourth Amendment right to be free from unreasonable searches and seizures. For the reasons set forth below, we affirm.

I.

Shortly before midnight on February 19, 1991, the victim of a shooting incident entered the Walton Hills (Ohio) Police Department and identified his assailant as Nicholas Lombardo. When further investigation revealed that Lombardo lived in Mayfield Heights, Ohio, and that he owned a blue van that matched the description given by the shooting victim, the Mayfield Heights Police Department dispatched some officers to stake out the Lombardo residence until Walton Hills authorities could obtain a warrant for his arrest.

Prior to the shooting, Centanni went to the Lombardo residence to visit her boyfriend, the son of Nicholas Lombardo. Nicholas Lombardo arrived at his home at approximately 11:15 p.m. Centanni, however, neither saw nor spoke to him that evening and left the house at approximately 12:25 a.m. Upon observing an unknown person (Centanni) leaving the Lombardo residence by car, the police officers surveying the house stopped the vehicle. After being pulled over, Centanni consented to a search of her purse, car, and person. The officers found nothing incriminating.

The officers then informed Centanni of the shooting incident and, despite having no evidence linking her to the crime under investigation, told her that she had to accompany them to the police station. The officers made it clear that she was not free to leave; accordingly, she drove to the station escorted by two police cars.

At the station, the officers immediately took Centanni to an interview room within the jail area. Even though she was not charged with any offense, Centanni was read her *Miranda* rights and then waived them. The officers

questioned Centanni for approximately thirty minutes about the layout of the Lombardo home, the events of that evening, and whether any firearms were in the house.

Concerned that Centanni might contact Lombardo if she were released, the officers decided to keep her at the station until Lombardo was arrested. Centanni was given a "choice" of staying in either a jail cell or the visitor's part of the prisoners visiting room. She chose the visiting room.

At about 4:00 a.m. that morning, the Mayfield Heights SWAT team arrested Lombardo at his home without incident. Centanni was released from the station at approximately 4:20 a.m. -- almost four hours after her initial detention.

Centanni later filed suit under 42 U.S.C. § 1983, claiming violations of her Fourth and Fourteenth Amendment rights resulting from her stop, search, and detention. The Officers answered with a general denial and raised the affirmative defense of qualified immunity. Both parties moved for summary judgment. The district court held that, while the initial stop and search of Centanni was constitutionally permissible, her removal to the police station and her continued detention amounted to a de facto arrest. Finding no probable cause, the court granted partial summary judgment for Centanni. In addition, the court determined that the Officers' actions violated clearly established law and so rejected their claim for qualified immunity. The Officers now appeal.[1]

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[1]Although there is not yet any final judgment, we still have jurisdiction over this case. A district court's denial of a claim of qualified immunity is treated as a final appealable order within the meaning of 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

II.

The Officers contend that they are entitled to qualified immunity because Centanni was never formally arrested and, due to the presence of exigent circumstances, they acted reasonably in detaining her. Clearly established law, however, dictates that this contention must be rejected.

Qualified, or "good faith," immunity is an affirmative defense, available to government officials performing discretionary functions, which shields them from civil liability under § 1983 for allegedly unlawful conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982). The analytical structure for addressing the applicability of the defense in any given case is two-fold, consisting of both a legal and factual determination.

The threshold issue is whether a constitutional right has been violated. *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991). If so, then in order to overcome a qualified immunity defense, a plaintiff must show that the law regarding this right was "clearly established" at the time that the constitutional violation occurred. *See Harlow*, 457 U.S. at 818. "Objective legal reasonableness" is the touchstone of this determination. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). That is, for a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. Thus, this standard demands that the "right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful." *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986); *see also Anderson*, 483 U.S. at 640 ("[I]n the light of pre-existing law the unlawfulness must be *apparent*.") (emphasis added); *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1096 (6th Cir. 1992) ("[T]he right asserted by the plaintiff must be 'particularized' as opposed to a general right."); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042-43 (6th Cir. 1992) ("[T]o find a clearly established constitutional

right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself.").

III.

The alleged constitutional violation at issue stems from the Fourth Amendment's guarantee, as incorporated against the states by the Fourteenth Amendment, that government officials may not subject citizens to unreasonable searches or seizures without proper authorization. An intrusion that lacks such authorization is presumptively unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). For instance, police need only have a reasonable suspicion of criminal activity to conduct a brief investigatory detention. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). A determination of reasonableness depends on a balance between "the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.* at 21. But when that detention rises to the level of a full-fledged arrest, the Fourth Amendment demands that the seizure be supported by probable cause. *See, e.g., Dunaway v. New York*, 442 U.S. 200, 212-14 (1979).

The Officers contend that because they never formally arrested Centanni, the constitutionality of her prolonged detention need only be analyzed under the reasonableness balancing test of *Terry*.[2] This argument, however, suffers from both an erroneous premise and a misguided application of Fourth Amendment jurisprudence.

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[2]The initial stop and search of Centanni is not contested on appeal. Rather, as the district court concluded, the police had a reasonable suspicion that the car Centanni was driving contained either the suspect of their investigation or the firearm used in the shooting. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Michigan v. Long*, 463 U.S. 1032 (1983). Accordingly, the issue on appeal is the constitutionality of the subsequent detention and removal to the police station.

The fact that the Officers never *formally* arrested Centanni does not resolve the issue of whether her detention required probable cause. The Fourth Amendment's protections are not limited to "traditional" arrests; indeed, "[a] clear deprivation of liberty caused by law enforcement officers without formal words is nonetheless an arrest." *United States v. Canales*, 572 F.2d 1182, 1187 (6th Cir. 1978). Thus, "at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments." *Hayes v. Florida*, 470 U.S. 811, 815-16 (1985). To be sure, no bright-line test exists for making this determination. *Florida v. Royer*, 460 U.S. 491, 506 (1983); *United States v. Hatfield*, 815 F.2d 1068, 1070 (6th Cir. 1987). But it is clear that the line between an investigatory detention and an arrest is crossed "when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be *and transport him to the police station*, where he is detained, although briefly, for investigative purposes." *Hayes*, 470 U.S. at 816 (emphasis added).

According to the Officers, that line was never crossed; therefore, they maintain that Centanni's detention should be examined under the "reasonableness" lens of *Terry*. In support of this argument, the Officers rely heavily on *Michigan v. Summers*, 452 U.S. 692 (1981), in which the Supreme Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705. In *Summers*, the Court reached its decision after concluding that exigent circumstances -- such as the risk of flight and harm to the officers -- outweighed the intrusion on the occupant's Fourth Amendment rights. *Id.* at 701-03. Similarly, the Officers argue that the "limited" invasion of Centanni's personal liberty was reasonable because of the possibility that she might have alerted Lombardo of his

impending arrest, which could have triggered an "armed encounter or hostage situation." Appellants' Br. at 25.

However, as the district court determined, the Officers' reliance on *Summers* is severely misplaced. The district court distinguished *Summers* on three grounds: 1) the detention in that case was incident to a proper search warrant; 2) Summers was an "occupant" of the premises named in the search warrant; and 3) Summers' detention was brief, limited only to the time necessary to search the premises. Significantly, the detention in *Summers* was confined to the suspect's home. The Court implicitly recognized as much when it noted that such a seizure involves "neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Summers*, 452 U.S. at 702.

Centanni's detention more closely resembles the facts of *Dunaway v. New York*, 442 U.S. 200 (1979), where the police -- without probable cause[3] -- took Dunaway to the station for questioning and, after obtaining incriminating statements, placed him under arrest. According to the police, the initial seizure and subsequent detention did not amount to an arrest because they had a "reasonable suspicion" that Dunaway possessed "intimate knowledge about a serious and unsolved crime." *Id.* at 207. The *Dunaway* Court, however, refused to adopt a multifactor balancing test of "reasonable police conduct under the circumstances." *Id.* at 213. Instead, the Court made it clear that such a test is limited to the "narrowly defined intrusions involved in *Terry* and its progeny." *Id.* at 14 (noting that "the requisite 'balancing' has been performed

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[3] The police had obtained an anonymous tip that supplied a possible lead implicating Dunaway in a crime. *Dunaway*, 442 U.S. at 203. But after questioning the supposed source of the lead -- a jail inmate awaiting trial for burglary -- they learned nothing that supplied enough information to obtain an arrest warrant. *Id.* Nevertheless, Dunaway was picked up at a neighbor's house and taken into custody for questioning. *Id.*

in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause"). Thus, the Court held that the police violated the Fourth Amendment when they seized Dunaway and transported him to the police station for interrogation. *Id.* at 216.

Neither *Terry* nor its progeny -- including *Summers* -- addressed a situation where the police seized an individual whom they did not even suspect of any crime and transported her to the station, questioned her extensively in the middle of the night, and then kept her under surveillance in a prisoners visiting room. "Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Id.* at 213.

Accordingly, we hold that Centanni's prolonged detention was not one of the "narrowly defined intrusions" contemplated by *Terry*. While the line between a reasonable *Terry* "stop" and de facto arrest is often unclear, it is quite apparent that there is no such thing as a *Terry* "transportation." Rather, the removal of a suspect from the scene of the stop generally marks the point at which the Fourth Amendment demands probable cause. *See, e.g., United States v. Sharpe*, 470 U.S. 675, 692 n.2 (Marshall, J., concurring) ("A stop can also be unduly intrusive if the individual is moved or asked to move more than a short distance . . ."); *Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (plurality opinion) (stop converted to arrest when officers moved detainee from concourse to small room during airport stop); *United States v. Martinez*, 808 F.2d 1050, 1055 (5th Cir.) (stop converted to arrest when police transported passengers to station after finding drugs in car), *cert. denied*, 481 U.S. 1032 (1987). Clearly, the police exceeded *Terry's* ambit when they extended Centanni's initial roadside detention into an all-night affair at the station house.

Any arrest, whether it be formal or de facto, requires probable cause. In general, this standard requires that the police have "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The Officers never assert that they had any cause, much less probable cause, to believe Centanni either had committed or was committing a crime. Therefore, as the district court determined, Centanni should have been free to leave once it was established that she was not involved in any criminal activity.

Thus, the Officers did violate Centanni's Fourth Amendment right to be free from an unreasonable seizure. This conclusion, however, does not end the inquiry.

IV.

In addition to establishing a constitutional violation, a plaintiff must show that the right in question was "clearly established" to overcome a defense of qualified immunity. *See Harlow*, 457 U.S. at 816-18. While "clearly established" does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson*, 483 U.S. at 640, it does imply that the unlawfulness of the official action must be reasonably apparent. Accordingly, the phrasing of the issue must be sufficiently particularized so as not to render the defense meaningless by converting it "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 639.

In light of the decisions discussed above, we conclude that it has been clearly established that -- regardless of any exigent circumstances -- the seizure and removal to the station house of an individual who is not suspected of any criminal activity constitutes a de facto arrest requiring probable cause. Surely, any reasonable official would understand that a warrantless intrusion of this degree has simply never been tolerated by this court or any other.

V.

For the foregoing reasons, we AFFIRM the district court's ruling that the Officers effectively arrested Centanni without probable cause and its denial of the Officers' motion for summary judgment on their claim for qualified immunity because clearly established law renders such action unconstitutional.

APPENDIX B

MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT

(Filed November 6, 1992)

Case No. 1:91CV2070

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARILYN CENTANNI,
Plaintiff,

vs.

EIGHT UNKNOWN OFFICERS, *et al.*,
Defendants.

JUDGE PAUL R. MATIA

This matter is before the Court upon the parties respective Motions for Summary Judgment. Plaintiff Marilyn Centanni's ("Centanni") Motion for Summary Judgment is granted with respect to all defendants save the City of Mayfield Heights. Defendants' Motion for Summary Judgment is denied in its entirety.

The facts concerning the incident are not in dispute. Shortly before midnight on February 19, 1991, Joseph DiBlasi entered former defendant Walton Hills Police Department with a gunshot wound allegedly inflicted by Nicholas Lombardo from a blue van. Upon investigation, Walton Hills Police learned that Lombardo was a resident of Mayfield Heights, Ohio and owned a blue

van. A call was made to the Mayfield Heights Police Department requesting surveillance of the Lombardo residence until an arrest warrant could be obtained.

Prior to the shooting, Centanni arrived at the Lombardo's residence at approximately 9:05 p.m. to visit Nicholas Lombardo's son, Chris. At approximately 11:15 p.m., Nicholas Lombardo arrived home and began to argue with his wife in a loud manner. Centanni left the Lombardo residence at 12:25 a.m.

Lieutenant Van Barto was the officer in charge of the Mayfield Heights Police during the period in question. He assigned two officers, Patrolman Lawson and Cunningham, to watch the Lombardo residence. At about 12:30 a.m., the officers observed an unknown person (Centanni) leaving the residence by car. Barto instructed Lawson and Cunningham to stop Centanni's car. The officers stopped the auto and requested permission to search Centanni's purse, auto, and person. After receiving permission, the officers conducted the search obtaining Centanni's driver's license and keys, but failing to locate Lombardo or his weapon.

Upon completing the search, the officers told Centanni that Lombardo was a suspect in a shooting and that she must return to the police station. Centanni drove her own auto, but was preceded and followed by police units. Lieutenant Barto testified that Centanni was taken to the police station to prevent her from alerting Lombardo and for questioning concerning Lombardo's activities and residence. She was not charged with an offense although she read and waived her *Miranda* rights. Centanni was then questioned by Officer Anderson of the Mayfield Heights Police Department. After making a limited written statement, Centanni was given the option to wait in a cell or a

secure visitor room in the Mayfield Heights Police Station. At no time was Centanni free to leave the police station.

Lombardo was subsequently arrested by the Mayfield Heights SWAT team at his residence after the issuance of a proper arrest warrant almost four hours after Centanni was taken to the police station. After Lombardo's arrest on the charge of attempted murder at 4:20 a.m., Centanni was permitted to leave the police station.

Centanni brought the instant §1983 action alleging violation of the Fourth and Fourteenth Amendments during the initial stop, search, and subsequent detention of Centanni at the Mayfield Heights Police Station. Named in the Amended Complaint are defendants City of Mayfield Heights, Chief of Mayfield Heights Police Dominic Caprara, Lieutenant Van Barto, Sergeant Alvin Schmitt, Patrolman Robert Cunningham, Patrolman David Anderson, Walton Hills Chief of Police Joseph Barr, and the Village of Walton Hills. Centanni voluntarily dismissed Walton Hills and Chief of Police Joseph Barr. All remaining parties filed their respective Motions for Summary Judgment concerning violation of the Fourth and Fourteenth Amendments and qualified immunity.

Encounters between law enforcement officers and citizens are seizures under the Fourth Amendment "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *California v. Hodari*, 111 S. Ct. 1547 (1981). Stopping an automobile and detaining its occupants constitutes a "seizure" within the meaning of the Fourth Amendment, even if the purpose of the stop is limited and the detention brief. *Delaware v. Prouse*, 440 U.S.

648 (1979). Based upon the undisputed facts, the Court concludes that the defendants' actions in stopping Centanni and her auto amount to a seizure under the Fourth and Fourteenth Amendments. *See Michigan v. Chesternut*, 486 U.S. 567 (1988).

However, seizure of person or property is not a *per se* violation of the Fourth and Fourteenth Amendments. Law enforcement officials may search and seize pursuant to a valid warrant issued by a neutral magistrate or, in the absence of a warrant, when the officer has probable cause to believe that a felony was committed. *Brinegar v. United States*, 338 U.S. 163 (1949). In limited exceptional circumstances, police officers may also stop and search a suspect based on reasonable suspicion that a crime has been or is about to be committed. *Terry v. Ohio*, 392 U.S. 1 (1968). Therefore, seizures constitute a violation of the Fourth Amendment unless accompanied by either probable cause for arrest or reasonable suspicion for a Terry-type stop.

Detentions under *Terry* are a narrowly drawn exception to the probable cause requirement of the Fourth Amendment. An officer may stop an individual reasonably suspected of criminal activity, briefly question the suspect, and conduct a search limited to the outer clothing in an attempt to find weapons. *Terry, supra* at 30. The scope of the questioning and search is severely limited.

> The officer may ask the detainee a moderate number of questions to determine his identity to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. *Berkemer v. McCarty*, 468 U.S. 420 (1984).

The *Terry* stop exception to the probable cause requirement is characterized by the limited nature of the intrusion and the need to provide police with protection during these encounters. *Terry, supra.*

When the stop is not limited nor necessary for police protection, it may have evolved into an arrest. Therefore, an issue arises whether a particular seizure was a *Terry* stop requiring only reasonable suspicion or an arrest, which must be accompanied by probable cause. The scope of activities during the *Terry* stop or investigative detention must reasonably be related to the circumstances which originally justified the stop. *United States v. Sharpe,* 470 U.S. 675 (1985). When police actions exceed the scope permitted by reasonable suspicion, the seizure becomes an arrest and must be supported by probable cause. *Dunaway v. New York,* 442 U.S. 200 (1979).

In distinguishing a *Terry*-stop from an arrest, the Sixth Circuit examines the reasonableness of the stop under the circumstances.

> (1) Whether there was a proper basis for the stop, which is judged by examining whether the law enforcement officials were aware of specific and articulable facts which gave rise to a reasonable suspicion; and (2) whether the degree of intrusion into the suspect's personal security was reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the official's conduct given their suspicions and the surrounding circumstances. *United States v. Hardnett,* 804 F.2d 358 (6th Cir. 1986), *cert. denied,* 479 U.S. 1097 (1987).

The Sixth Circuit also examines the conduct of the police, the characteristics of the particular person seized, and the physical surroundings of the encounter. *United*

States v. Grant, 920 F.2d 376 (6th Cir. 1990). More specifically, the Sixth Circuit considers whether the detainee was transported to another location, the significance of restraints on detainee's movement, and the amount of coercion imposed upon the detainee, *Florida v. Rover*, 460 U.S. 491 (1983).

The Court concludes that the intial stop and search was reasonable as a *Terry*-type stop. This is not a case where reasonable suspicion was based solely upon association or proximity to persons suspected of criminal activity or "inchoate suspicion or hunch". *See Brown v. Texas*, 443 U.S. 47 (1979); *United States v. Sokolow*, 490 U.S. 1 (1989); *Ybarra v. Illinois*, 444 U.S. 85, *reh'g denied*, 444 U.S. 1049 (1979). Centanni was leaving the home of a murder suspect identified by the victim. Police had reason to believe that the car Centanni was driving contained either the suspect or the firearm, based upon the specific and articulated facts provided by the victim and police surveillance at the scene.

Pursuant to the valid *Terry*-type stop, the police were also justified in conducting a limited search of Centanni and her vehicle. During roadside encounters, police may search the passenger compartment of an auto, limited to those areas where a weapon might be hidden, if the officer possessed a reasonable belief that the suspect is dangerous and may obtain immediate control over a weapon. *Michigan v. Long*, 463 U.S. 1632 (1983); *United States v. Pauline*, 935 F.2d 739 (6th Cir. 1981).

In contrast, Centanni's subsequent detention and removal to the police station amounted to an unreasonable seizure under the Fourth and Fourteenth Amendments. After applying the Sixth Circuit guidance for distinguishing arrests from Terry-type stops, the Court concludes that the subsequent detention amounted

to an arrest without the necessary probable cause. *See Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. Hatfield, supra; United States v. Grant, supra.* By transporting Centanni to the police station, providing *Miranda* warnings, questioning her extensively, and preventing her from leaving the station, the initial Terry-type stop was extended to a full arrest. As stated by the Supreme Court in *Dunaway, supra*:

> Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law . . . Any exception that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that the Fourth Amendment seizures are "reasonable" only if based on probable cause. *Dunaway v. New York, supra* at 212-213.

Therefore, the detention of Centanni after the search of her person and auto amounted to an arrest, requiring probable cause.

The facts known by the defendants were insufficient to constitute probable cause for arrest. Although the Court has concluded that the initial stop and search of Centanni was accompanied by reasonable suspicion, the search conclusively established that Centanni was not involved in any criminal activity. The Supreme Court has found probable cause only when "the facts and circumstances within the [officer's] knowledge and of

which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Peck v. Ohio,* 379 U.S. 89 (1964). After searching the auto and Centanni's person, the defendants established that Centanni had *not* in fact committed or was committing an offense. At that point, Centanni should have been free to go, rather than arrested in terms of the Fourth Amendment.

Finally, the Court finds defendants' reliance upon *Michigan v. Summers,* 452 U.S. 692 (1987), and *Maryland v. Buie,* 494 U.S. 325 (1990), misplaced. In both cases, the Supreme Court permitted limited detention or protective sweeps after arrest based upon probable cause or a valid warrant. Defendants erroneously attempt to extend this limited exception to this matter where no probable cause or warrant existed. The exception does not reach so far as to preclude all protection under the Fourth Amendment.

The issue in *Buie* was whether officers who had entered a home pursuant to a valid arrest warrant were justified in conducting a "protective sweep" of the basement. The Supreme Court applied the rationale of *Terry, supra,* in holding as follows:

> We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors any individuals posing a danger to those on the

> arrest scene. This is no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one. *Maryland v. Buie*, 494 U.S. at 334.

The case does not support defendants' contention that a reasonableness test should be applied supporting Centanni's detention and subsequent arrest. The Court is unwilling to adopt the above as precedent in this matter without probable cause or an arrest warrant.

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Supreme Court concluded that a warrant to search a home for contraband implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. *Summers, supra*, at 705. Relying upon a judicial officer's issuance of the search warrant, the Court concluded:

> If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home. Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. *Michigan v. Summers*, 452 U.S. at 704-705.

The Court concludes that *Summers* does not support the instant detention and arrest for the following reasons: 1) detention of petitioner in *Summers* was incident to a proper search warrant; 2) petitioner Summers was an "occupant" of the premises named in the search warrant; and 3) Summers' detention was brief, limited only to the time necessary to search the

premises.[1] In contrast, Centanni's detention and arrest was not pursuant to a valid warrant. The warrant subsequently obtained several hours later concerned Lombardo and his residence, not Centanni's car. Finally, Centanni's detention was anything but brief.

Therefore, defendants arrested Centanni without probable cause in violation of the Fourth and Fourteenth Amendments.

Further, the Court concludes that the individual defendants are not entitled to qualified immunity. In light of the Sixth Circuit and Supreme Court precedent discussed above, the right to be free from unreasonable seizure was "sufficiently clear that a reasonable official would understand what he is doing violates that right." *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992); *Anderson v. Creighten*, 483 U.S. 635 (1987). Any reasonable officer given the above well established law

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[1] The Supreme Court in *Summers* further clarified its holding in footnotes 19 and 21 as follows:

> 19 In refusing to approve seizures based on less than probable cause, the *Dunaway* Court declined to adopt a "multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests." The rule we adopt today does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.
>
> * * *
>
> 21 Although special circumstances, *or possibly a prolonged detention*, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case. *Michigan v. Summers*, supra at 705 (emphasis added).

would know that detention and arrest without warrant or probable cause violates the Fourth and Fourteenth Amendments. Therefore, the individual defendants are not afforded the protection of qualified immunity in this matter.

Since there are no genuine issues of facts and plaintiff is entitled to judgment as a matter of law with respect to the individual defendants, plaintiff's Motion for Summary Judgment is granted in part. Defendants' Motion for Summary Judgment is denied.

The Court further concludes that genuine issues of material fact exist with respect to claims against the City of Mayfield Heights. In the presence of such issues of material fact, summary judgment requested by Centanni against the City and by defendant City of Mayfield Heights against Centanni must be denied. The remaining portion of this matter will go forward with the final pre-trial as previously scheduled on December 4, 1992 at 9 a.m. and trial on December 14, 1992 at 9:00 a.m.

IT IS SO ORDERED.

/s/ PAUL R. MATIA
United States District Judge

(2)

No. 93-1747

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

EIGHT UNKNOWN OFFICERS,
Petitioners,

vs.

MARILYN CENTANNI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A POLICE OFFICER HAS QUALIFIED IMMUNITY TO SEIZE A PERSON WHO HAS LEFT THE RESIDENCE OF A SUSPECT TO A CRIME, TRANSPORT HER TO A POLICE STATION, READ AND OBTAIN A WAIVER OF HER *MIRANDA* RIGHTS, INTERROGATE HER, AND DETAIN HER FOR OVER FOUR HOURS WITHOUT PROBABLE CAUSE TO BELIEVE SHE HAS COMMITTED ANY CRIME?

IDENTIFICATION OF PARTIES

In addition to the Petitioners, Eight Unknown Police Officers, and Respondent Marilyn Centanni, the City of Mayfield Heights, Lieutenant Van Barto, Chief Dominic Caprara, Sergeant Alvin Schmitt, and Officers David Anderson and Robert Cunningham were all parties to the proceeding below (See Sup. Ct. R. 24.1(b)).[1]

[1] The City of Mayfield Heights, Chief Caprara, and the other Mayfield Heights police officers were named by Centanni in her Amended Complaint.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reprinted at pages A1-A10 of the Petition For a Writ of Certiorari ("Petition"), and is to be published as *Centanni v. Eight Unknown Officers,* 15 F.3d 387 (6th Cir. 1994). The opinion of the District Court For the Northern District of Ohio, Eastern Division, is reprinted at pages A11-A21 of the Petition.

STATEMENT OF JURISDICTION

This Court has discretionary jurisdiction in this case pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set out in the Petition, at page 2.

STATEMENT OF THE CASE

Marilyn Centanni ("Centanni") brought this action for damages pursuant to 42 U.S.C. §1983, challenging the unlawful stop, search, arrest, interrogation and detention of her by officers of the Mayfield Heights Police Department. On February 19, 1991, Centanni visited her boyfriend, Chris Lombardo, at his parents' (Nicholas and Maria Lombardo) Mayfield Heights home. Centanni left the Lombardo home at approximately 12:25 a.m., the morning of February 20th. She left having spent the evening without seeing or speaking to Nicholas Lombardo ("Lombardo").

Unbeknown to Centanni, the Mayfield Heights Police Department had staked out the Lombardo home after being notified by the City of Walton Hills Police Department that Nicholas Lombardo was a suspect in a shooting. Lombardo was identified by the victim as his assailant. There was no indication that Nicholas Lombardo had an accomplice to the shooting. Nicholas Lombardo arrived home at approximately 11:15 p.m. and engaged in an argument with his wife, which Centanni overheard.

Upon leaving the Lombardo home, Centanni began driving to her residence in her gold Pontiac Grand Am. The shooting suspect's vehicle had been identified as a blue van. After receiving orders from Lieutenant Barto to stop Centanni's car, Patrolman Cunningham (one of the officers assigned to the stakeout) stopped her vehicle by activating his vehicle's flashing lights.

Even though Centanni was not a suspect in the shooting in which Nicholas Lombardo was a suspect, and in fact was not suspected of any crime (even a traffic violation) she was ordered to relinquish her car keys and driver's license. Upon request, she consented to a search

of her purse, her person (a "patdown" search) and her vehicle. No incriminating evidence was found during these searches.

The officers then informed Centanni of the shooting incident. The officers told Centanni she would have to accompany them to the Mayfield Heights Police Station, despite the lack of evidence linking her to Lombardo's alleged crime. The officers made it clear that she was not free to leave, and she drove to the station in her vehicle, escorted in front and rear by two police cars.

At the station, Centanni was taken by two officers to an interview room in the jail area. Although she was not charged with any offense, she was given *Miranda* warnings, and signed a statement waiving those rights.

Centanni was interrogated by various officers for approximately 30 minutes about the physical layout of the Lombardo home, people present, the evening's events, the presence of firearms, and her speculation as to Nicholas Lombardo's mental state. She was later briefly interrogated by a Walton Hills officer concerning the same matters.

Despite the Mayfield Heights Police not suspecting Centanni of any crime (even after the interrogation), she was informed that she would be held in the station to insure that she did not make any phone calls. Based on the officers' mere speculation that Centanni would attempt to contact Nicholas Lombardo (or otherwise interfere with his arrest) Centanni, a single mother who resided with her parents, was held incommunicado at the station for over three hours. She was not free to leave until Nicholas Lombardo was arrested and she was told by the officers she could leave.

Given the "Hobson's choice" of awaiting her detention in a jail cell or the secured visitors part of the prisoner's visiting room, she chose the latter. She was detained in this room for approximately three hours.

At approximately 4:00 a.m., the Mayfield Heights SWAT Team arrested Lombardo at his home without incident. After an arrest warrant was issued for Nicholas Lombardo, the SWAT team was deployed around the Lombardo home. Lieutenant Barto telephoned Nicholas Lombardo, explained the situation to him, and asked that he walk out the front door and voluntarily surrender, which Lombardo did.

After the arrest, Centanni was released from the station at approximately 4:20 a.m.—almost four hours after her initial detention and transportation to the station. She was never charged with any crime in connection with this incident.

The District Court granted Centanni's Motion for Summary Judgment against the officers, and denied the officers' motion for summary judgment on their claim of qualified immunity. In the officers' appeal from the District Court's interlocutory order, the Sixth Circuit affirmed the District Court's ruling that Centanni was arrested without probable cause and upheld the denial of the officers' summary judgment motion (Petition, A10).[2]

Petitioners now seek further interlocutory review of the District Court's decision.

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[2] Both the District Court and the Sixth Circuit found that the officers' initial stop, detention, and search of Centanni's purse, person and vehicle was permissible under *Terry v. Ohio*, 392 U.S. 1 (1968) and *Michigan v. Long*, 463 U.S. 1032 (1983), but found the subsequent detention and removal to the police station impermissible (See, Petition, pages A15, A5, n.2).

SUMMARY OF ARGUMENT

The Supreme Court and United States Appellate Courts have long held that de facto arrests and detentions of individuals must be premised upon probable cause to comply with Fourth and Fourteenth Amendment guidelines. Stripped of repetitive arguments replete with *non sequitur* conclusions, the gist of Petitioners' claim is that this Court should grant the Petition to vitiate the probable cause standard which has always been held necessary to support a de facto arrest and detention. Since this Court has previously determined that probable cause is necessary to detain a *suspect* of a crime in these (and less intrusive) circumstances (*Dunaway v. New York*, 442 U.S. 200 (1979)), there is no reason why this Court should expend its limited time and resources to question whether the probable cause standard should apply to a non-suspect under the facts presented here.

REASONS FOR DENYING THE PETITION

I. Police Officers Have No Qualified Immunity To Seize A Person Who Has Departed The Residence Of A Suspect To A Crime, Transport Her To A Police Station, Read And Obtain A Waiver Of Her *Miranda* Rights, Interrogate Her, And Detain Her For Over Four Hours Without Probable Cause To Believe She Has Committed A Crime.

A. The Sixth Circuit's decision affirming the District Court's denial of qualified immunity to the officers squarely follows the Supreme Court's decision of *Dunaway v. New York,* 442 U.S. 200 (1979), and its progeny.

The Sixth Circuit's analysis squarely follows the Supreme Court's rulings applying the probable cause standard to a seizure of a person which constitutes a de facto arrest. The Petitioners mischaracterize the Supreme Court's rulings which distinguish between applying a "reasonableness" standard for temporary detentions, and the probable cause standard which is required whenever a seizure is equivalent to a technical arrest. The Supreme Court and lower courts have clearly established that probable cause is required when a seizure of a person amounts to a de facto arrest. The Sixth Circuit correctly applied the law to the case *sub judice,* and, there being no conflict with the Supreme Court's decisions, the Petition should be denied (*Cf.* Sup. Ct. R. 10.1(c)).

The Supreme Court has consistently adhered to the basic principal of Fourth Amendment jurisprudence that an officer must have probable cause in order to make an arrest. *Beck v. Ohio,* 379 U.S. 89 (1964). The "probable cause" necessary to effectuate an arrest is whether the officer, at the moment the arrest was made, was aware of

facts and circumstances consituting reasonably trustworthy information sufficient to warrant a prudent person in believing the arrestee had committted or was committing an offense. *Id.*, 379 U.S. at 91.

As applied to searches and seizures, this Court has distinguished between police stops, seizures, detentions and searches where something less than probable cause is required, and stops, detentions, searches and seizures requiring probable cause. While *Terry v. Ohio*, 392 U.S. 1 (1968) made it clear that temporary detentions (stop and frisk) on the street may be made on less than probable cause (*i.e.*, reasonable suspicion), the Court has consistently held that once a detention of a suspect exceeds the scope of a *Terry* (investigatory) stop, the police must have probable cause for the detention. *See, Dunaway v. New York*, 442 U.S. 200 (1979); *Florida v. Royer*, 460 U.S. 491 (1983).

In *Dunaway*, the *suspect*, without probable cause, was taken to the police station, put in an interrogation room and questioned, and would have been physically restrained if he tried to leave or refused to accompany the police officers to the station. The Supreme Court rejected the government's argument that these actions amount only to a *Terry* stop. "Indeed, any 'exception' [to the requirement of probable cause] that would cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Id.* at 213.

The *Dunaway* Court also specifically decided not "[t]o adopt a multifactor balancing test of reasonable police conduct under the circumstances to cover all seizures that do not amount to technical arrest. . . . [since] [t]he requisite balancing has been performed in centuries of precedent and is embodied in the principal

that seizures are reasonable only when supported by probable cause." *Id.* at 213-14. Finally, the court stated that "detention for custodial interrogation—regardless of its label—intrudes so severely on interest protected by the Fourth Amendment as necessarily to trigger traditional safeguards against illegal arrest." *Id.* at 216. Thus, the Court has previously rejected application of the reasonableness test asserted by the Petitioners herein.

The Supreme Court reaffirmed this view in *Hayes v. Florida*, 470 U.S. 811 (1985), stating:

> Our view continues to be that the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures . . . are sufficiently, like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.

Id. at 816. *See also, Florida v. Royer, supra* (an investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop).

Without question, Marilyn Centanni was subjected to a de facto arrest by the Mayfield Heights Police Officers when she was forced to accompany them to the police station, read her *Miranda* rights, interrogated, and detained for approximately four hours. Admittedly, the officers lacked probable cause to believe she committed, or took part in, any crime. The Sixth Circuit properly applied *Dunaway* and its progeny to the case *sub judice*, in determining that the officers needed probable cause before transporting Centanni to the police station, interrogating her, and detaining her.

An anomalous, if not outrageous, situation would exist if the principles enunciated in *Dunaway* do not apply to Centanni simply because she was a free citizen who was *not* a suspect to a crime. Custodial interrogation and detention of a non-suspect, based on the unfounded supposition that she would otherwise have the *opportunity* to notify a suspect of police surveillance, would permit officers to make warrantless seizures and detentions of persons for lengthy periods of time premised solely on their speculation that the detainee might commit some future obstructive act, without having any evidence to support this "psychic" conclusion.

Certainly, the officers must, at a minimum, establish probable cause to believe Centanni has committed a crime or has begun taking part in an obstructive act to warrant such a severe intrusion on her right to be let alone. *See, Beck v. Ohio, supra.* If not, George Orwell's "Big Brother" police state is certainly alive and well in 1994 Mayfield Heights, Ohio, where the police may detain free citizens based on the officers' speculation that the citizen's liberty provides an opportunity to commit a future criminal or obstructive act when the citizen has not manifested any intent or propensity to do so.

Petitioners obfuscate the crucial issue of whether the intrusion on Centanni's liberty was sufficient to constitute a de facto arrest such that the restraint could only be premised upon probable cause. Unequivocally, the transportation, four-hour detention, interrogation, reading and waiving her *Miranda* rights, and holding her incommunicado when she was not a suspect to any crime, constitutes a de facto arrest outside the ambit of the initial *Terry* stop. When the initial investigatory

Terry stop (which in this case included a stop, identification, and a search of her purse, her person, and her vehicle) concluded without the finding of any incriminating evidence, Centanni should have been released from custody.

As the Sixth Circuit noted, by transporting Centanni to the police station, providing *Miranda* warnings, questioning her extensively, and preventing her from leaving the station, the initial *Terry*-type stop was extended to a full arrest (Petition, pages A8-A9). Since the Petitioners lacked probable cause to believe Centanni was involved in any crime, the denial of qualified immunity was proper. This Court ought not to spend its valuable time scrutinizing the record when it has previously determined that the detention of a *suspect* to a crime, under less intrusive conditions, is impermissible without probable cause (*See Dunaway, Royer, supra*).

B. The Sixth Circuit Court of Appeals decision denying qualified immunity to the officers does not conflict with the decisions of other United States Appellate Courts.

The United States Appellate Courts have uniformly applied the principles enunciated in *Dunaway v. New York, supra*, and have mandated that whenever a *Terry* seizure/detention is tantamount to a de facto arrest, the arrest is unlawful unless it is based on probable cause that the individual arrested committed or is otherwise involved in a crime. *See e.g., United States v. Zapata*, 18 F.3d 971, 975 (1st Cir. 1994) (investigatory stops can be justified by reasonable suspicion, while de facto arrests are sufficiently coercive to require probable cause); *Soares v. Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993) (right not to be arrested in the absence of probable

cause); *Cabellero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992) ("arrest by police officers without probable cause violates the Fourth Amendment's guarantee of security from unreasonable searches and seizures"); *Clay v. Conlee*, 815 F.2d 1164, 1168 (8th Cir. 1987) (the constitution prohibits arrests not based on probable cause);[3] *United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985) (officer's transportation of suspect to police station in hopes of developing probable cause was abuse of investigatory detention); *United States v. Willis*, 759 F.2d 1486 (11th Cir.), *cert. denied*, 474 U.S. 849 (1985); *United States v. Webster*, 750 F.2d 307 (5th Cir.), *cert. denied*, 471 U.S. 1106 (1984) (unlike brief investigatory seizures, custodial questioning on less than probable cause required for full-fledged arrest is illegal); *United States v. Poole*, 718 F.2d 671 (4th Cir. 1983) (once investigatory stop has been completed, any further detention must be based on consent or probable cause).[4]

The United States Appellate Courts are not in conflict over the application of the Supreme Court's rulings that detentions after investigatory stops which are equivalent to de facto arrests must be based on probable cause. Therefore, the Petition should be denied (See, Sup. Ct. R. 10.1(a)).

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[3] Citing, *Beck v. Ohio*, 379 U.S. 89 (1964).

[4] *Accord, United States v. Chamberlin*, 644 F.2d 1262, 1266 (9th Cir. 1980) *cert. denied*, 453 U.S. 914 (1981) (20-minute detention of suspect in patrol car after legitimate *Terry* stop is impermissible under *Dunaway* since the seizure was tantamount to arrest and officer lacked probable cause, despite officer's acting "reasonable"); *United States v. Tehrani*, 826 F. Supp. 789 (D. Vt. 1993) (seizure which constitutes an arrest must be based on probable cause); *Armster v. City of Riverside*, 611 F. Supp. 103, 108 (D.C. Cal. 1985) ("if a detention does go beyond an investigative detention to constitute a de facto arrest, it must be based on probable cause"), citing, *Florida v. Royer*, 460 U.S. 491, 498-99 (1983); and *Dunaway, supra*, 442 U.S. at 208-209.

CONCLUSION

For each of the foregoing reasons, this Court should deny the Petition for Certiorari, and thereby allow Marilyn Centanni, who was victimized by the officers on February 20, 1991, to have the fair trial on this matter to which she is entitled, as soon as possible.

Respectfully submitted,

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